United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-2129

No. 76-2129

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VASSILIOS LULOS,

PETITIONER-APPELLANT

v.

DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK, NEW YORK, OR ANY OTHER PERSON HAVING THE SAID PETITIONER-APPELLANT IN CUSTODY,

RESPONDENTS-APPELLEES

On Appeal From Judgment of the
United States District Court for
the Eastern District of New York

BRIEF OF PETITIONER-APPELLANT AND APPENDIX

B
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RESPONDENT-APPELLEE

On Appeal From Judgment of the
United States District Court for
the Eastern District of New York

BRIEF OF PETITIONER-APPELLANT AND APPENDIX

ISSUES PRESENTED

1. Are exclusion proceedings appropriate in the case of one brought to the United States involuntarily, or must a period of voluntary departure time elapse, and then, failing departure, deportation proceedings begin?

2. Is there any competent evidence of record showing that appellant was an "applicant for admission" to the United States?

3. Under habeas corpus procedure, was it error for the District Court to dismiss the petition without a hearing on the merits?

4. Did appellee abuse his discretion in refusing to parole appellant without bond, or under bond of $1,000.00?

5. Was it error for the District Court to refuse to release appellant on bond of $1,000.00?

STATUTES INVOLVED

Section 212(a)(14), 8 U.S.C. 1182(a)(14); Section 212(a)(16), 8 U.S.C. 1182(a)(16); and Section 212(a)(20) of the Immigration and Nationality Act of 1952, as amended [8 U.S.C. 1182(a)(20)], provide:

> "(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States . . .
>
> (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 101(a)(27)(A) (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in section 203(a) (3) and (6), and to nonpreference immigrant aliens described in section 203(a)(8): . . .

(16) Aliens who have been excluded from admission and deported and who again seek admission within one year from the date of such deportation, unless prior to their reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their reapplying for admission; . . .

(20) Except as otherwise specifically provided in this Act, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 211(a);"

Section 212(d)(5) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1182(d)(5), provides:

"(5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

Section 106(a)(4) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1105(a)(4), providing for judicial review in the Court

of Appeals of final orders of deportation entered under 8 U.S.C. 1252(b) [242(b)] provides in part:

> "(4) except as provides in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;"

28 U.S.C. 2243, 2246 and 2247 provide:

> "§ 2243. Issuance of writ; return; hearing; decision.
>
> A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.
>
> The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.
>
> The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.
>
> When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.
>
> Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.
>
> The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.
>
> The return and all suggestions made against it may be amended, by leave of court, before or after being filed.
>
> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require. (June 25, 1948, ch. 646, 62 Stat. 965.)

§ 2246. Evidence; depositions; affidavits.

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits. (June 25, 1948, ch. 646, 62 Stat. 966.)

§ 2247. Documentary evidence.

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea, and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence. (June 25, 1948, ch. 646, 62 Stat. 966.)"

STATEMENT

Appellant is a 24 year old male native and citizen of Greece. He arrived in the United States on August 19, 1976, as a deportee from Costa Rica. He was bound over for an exclusion hearing and incarcerated. He has been incarcerated since.

Appellant was found excludable and deportable in a decision of Immigration Judge Edward P. Emmanuel in an opinion dated August 24, 1976, on the ground that he was an immigrant not in possession of a valid immigrant visa. On September 16, 1976, the Board of Immigration Appeals affirmed on the same grounds.

On October 8, 1976, District Court Judge Mark A. Costantino dismissed appellant's petition for a writ of habeas corpus, and this appeal follows.

The major issue of fact is whether appellant applied for admission to the United States within the meaning of the statute.

ARGUMENT

I. EXCLUSION PROCEEDINGS ARE INAPPROPRIATE IN THE CASE OF ONE BROUGHT TO THE UNITED STATES INVOLUNTARILY

Appellant arrived in the United States abroad Pan Am Flight 542 from San Jose, Costa Rica destined to New York, having been forcibly deported from Costa Rica pursuant to an order of the immigration authorities of that country. Immediately upon his arrival he was brought to the United States Immigration and Naturalization Service inspection station by officials of Pan Am Airlines, where he was bound over for an exclusion hearing, upon the charge that he was excludable from the United States under Section 212(a)(20) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(20), in that he was an intending immigrant who at the time of application for admission and was not in possession of a valid unexpired immigrant visa. The exclusion proceedings are erroneous as a matter of law, in that appellant was not then, and is not now, an intending immigrant, nor did he make an application for admission to the United States.

On August 18, 1976, appellant had no intention of coming to the United States, nor the remotest desire to do so. There has never been any allegation to the contrary. He was then fully aware of the fact that he could not come to the United States until he was in possession of a valid, unexpired

immigrant visa. Appellant realized this, and wished only to remain in Costa Rica until this could be accomplished (or go to the Dominican Republic, where his immigrant visa file was, rather than have it transferred to Costa Rica). Instead, the Costa Rican authorities deported him to the United States, a circumstance over which he had no control, and which in fact, he opposed.

As was laid down by Learned Hand in U.S. ex rel Bradley v. Watkins, 163 F. 2d 328, 330 (2nd Cir., 1947):

> "The Immigration Acts, we submit, deal with aliens who are voluntarily seeking to enter the United States." (Emphasis supplied.)

In that case, Bradley had been brought to the United States against his will by the United States Navy. The Immigration Service held him excludable as being an intending immigrant not in possession of a valid immigrant visa. The District Court held the voluntariness of his arrival immaterial, and upheld the exclusion order. The Second Circuit reversed, holding that one brought to the United States against his will was not an immigrant, and did not need a visa.

Bradley was ordered enlarged, but was not permitted to remain in the United States indefinitely. He was merely to be given "an opportunity to depart voluntarily."

In the instant case, appellant asks for nothing more than this same opportunity. Having been brought here involuntarily, he merely wishes to remove the thorn of having his person on United States soil by removing

the person. All he asks is that he be allowed to do so without the entry of an order of exclusion, which would prohibit his return to the United States, even with a valid visa (of any type), for a period of one year. This would be a monstrous punishment for an offense of which appellant had no part in the commission of, and which, if fact, he did everything possible to avoid. See also: Moffitt v. United States, 128 F. 375 (9th Cir., 1925).

Of similar import is the case of U.S. ex rel Paetau v. Watkins, 161 F. 2d 457 (2nd Cir., 1947), wherein Paetau, a German national resident in Guatemala, was ordered deported to Germany by Guatemalan authorities. He was put on a plane bound for the United States, and, upon arrival in the United States, was ordered excluded and deported for not being in possession of a visa. It was held, in reversing the District Court, that one seized and brought to the United States could not be excluded and deported without being given an opportunity to depart voluntarily first. Jurisdiction to grant bail was also found in the District Court.

Paetau, in accord with Bradley, supra, teaches, at p. 458:

> "There would seem to be statutory authority for the eventual removal of an alien whose entrance, originally involuntary, becomes clearly voluntary by his continued unforced stay."

It is noteworthy that Paetau even made an application for admission, and his presence in the United States was still found involuntary, due to the fact that his sole desire was to return to Guatemala which would not have him,

and was en route to Germany, a place where he clearly did not want to go. Appellant herein has never applied for admission to the United States.

In Bradley and Paetau, as well as Ludwig and Schirrmeister, infra, the Second Circuit noted that the record disclosed "harshly coercive and arbitrary" governmental action. This is equally so in the instant case, for appellant cannot understand what conceivable prupose of the immigration laws is served by visiting the harshest possible retribution - a binding and disabling order of exclusion - on one whose very presence in the United States is due to circumstances beyond his control, and whose eventual plans for lawful permanent residence here would be dashed by such an order.

In U.S. ex rel Ludwig v. Watkins, 164 F. 2d 456 (2nd Cir., 1947), the Court again held that one brought to the United States against his will was not excludable as not being in possession of a valid visa, but rather had the right to depart voluntarily before deportation proceedings could be brought against him.

See also: U.S. ex rel Sommerkamp v. Zimmerman, 178 F. 2d 645 (3rd Cir., 1949) and U.S. ex rel Schirrmeister v. Watkins, 171 F. 2d 858 (2nd Cir., 1949).

Appellant has not been given such an opportunity, and, if it is accorded to him, will take immediate and successful advantage of it. Counsel has arranged with the authorities of the Dominican Republic for his passage to

that country, where his immigrant visa file has been all along. This can be done within three weeks after grant of parole. To accomplish this, appellant must be physically present at the consulate of the Dominican Republic, which is the reason that enlargement is so crucial in this case.

The Immigration Judge (Appendix A) and the Board of Immigration Appeals (Appendix B) made much of the fact that in the cases cited above, the coming to the United States was effected by agencies of the United States, or with the tacit approval of agencies of the United States. This factor, however, is not and cannot be controlling. The issue in those cases, as here, is that of "entry" vel non, with its concommitant finding of "voluntariness vel non." See: Bradley v. Watkins, supra.

One who is in the United States as a result of a shipwreck intends no entry into the United States, so is not a returning immigrant. Delgadillo v. Carmichael, 332 U.S. 388 (1947). As Mr. Justice Douglas said there:

> "His itinerary was forced upon him by wholly fortuitous circumstances . . . Respect for the law does not thrive on captious interpretations."

One who is in the United States as a result of never having been told the route of his passage would take him out of it intends no entry into the United States, and so is not a returning immigrant. DiPasquale v. Kaufmann, 158 F. 2d 878 (2nd Cir., 1947). There, Judge Learned Hand commented, at p. 879:

> "Caprice in the incidence of punishment is one of the indicia of tyrrany, and nothing could be more disingenuous than to say that deportation in these circumstances is not punishment."

In all the cases cited, there is only one constant factor: the alien did not intend to come into the United States. The forces which brought him here were not of his making, and the involuntariness of the coming vitiated any finding of intending immigrant status.

The origin of the force - kidnapping, shipwreck, a United States Navy gunboat, being asleep on a train, or the government of Costa Rica - is immaterial. The teaching of the cases is that one is not punished for what one could not foresee and did not intend. Where an intervening force of whatever nature is responsible for the coming, the alien has not entered the United States, is not an applicant for admission and is not an "intending" immigrant. The law is, if such an alien's present right to remain here does not appear, he must first be allowed to depart voluntarily before he can be expelled.

II. THERE IS NO EVIDENCE IN THE RECORD TO SHOW THAT APPELLANT WAS AN APPLICANT FOR ADMISSION

A thorough search of the record in the case fails to show any evidence whatsoever of any application for admission to the United States. On the contrary, the only piece of testimony touching on the question is appellant's sworn statement of August 19, 1976, in which he asserted that his intention was

not to remain in the United States, but rather was to proceed to Greece, but for his lack of documentation. The reason for his detention is listed on Form I-546 as "revaluation of passport and completion of inspection." There is nothing in the record to show that appellant asked for inspection in the first place.

To the best of counsel's knowledge, appellant was ordered by Pan Am agents to appear for inspection, and was brought to the inspection station by them. This would not constitute an application for admission. Because the District Court denied an evidentiary hearing, what questions were put to appellant and the exact circumstances of his arrival remain unknown (see Point III, infra).

The Board of Immigration Appeals, in its opinion of September 1[illegible], 197[illegible], flatly asserts that it is "clearly implied in the applicant's present and past conduct that he is seeking admission to the United States."

Appellant does not contend that he will not be making an application for admission to the United States at some future time. To the contrary, his desire to avoid the awful consequences of an order of exclusion is predicated solely on his eventual success in making that application. The point is that he is not an applicant for admission now. The Board has said that because he was an applicant for admission in January, 1970, and because he will eventually apply for admission at some time in the future, he must, therefore, be an applicant for admission now. Nothing could be further from the truth.

Appellant well knew the calamitous consequences of making an application for admission to the United States at this time. He tried to avoid even coming to the United States, but, once here, has consistently applied for nothing more than for permission to depart. Counsel in fact now only asks for parole (which is not admission) for the limited purpose of making arrangements for appellant's swift departure to the Dominican Republic (see footnote, p. 9-10).

What transpired in the past (his nonimmigrant application of January, 1970) and what will transpire in the future in the Dominican Republic (his immigrant application) have no weight whatsoever in determining the present intentions of appellant, which do not include making any sort of application for entry. As the Board itself has held (Matter of Hosseinpour, I. D. No. 2349, March 5, 1975, attachment), a desire and hope to pursue permanent resident status in the future in a lawful way is in no way determinative of one's present intentions. Many court cases are in accord, including U.S. ex rel Rizzo v. Curran, 13 F. 2d 233 (S.D. N.Y. 1925); Brownell v. Carija, 254 F. 2d 78 (D.C. Cir., 1957); U.S. ex rel Jolly on behalf of Brown v. Reimer, 10 F. Supp. 992 (S.D. N.Y. 1935); U.S. ex rel Chryssikos v. Commissioner of Immigration, 3 F. 2d 372 (2nd Cir., 1924).

Appellant has been an applicant for admission in the past, which application was granted (contrary to the allegations of appellee's return, appellant was lawfully admitted as a nonimmigrant, class D-1, in January, 1970). He

will be an applicant for admission in the future, which appellant has every reason to believe, will also be granted. Appellee is not now an applicant for admission, and to impute to him this false intent without any evidence therefor is error.

III. THE DISTRICT COURT ERRED IN DISMISSING THE PETITION WITHOUT A HEARING ON THE MERITS

The basic issue in this case is whether appellant falls within the purview of section 212(a)(20) of the Act, 8 U.S.C. 1182(a)(20), which provides for the exclusion from the United States of aliens

> "Except as otherwise specifically provided in this chapter, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter . . ." (Emphasis supplied.)

Because the District Court dismissed the writ without a hearing on the merits, appellant has not been given an opportunity to show by evidence that he is not an "immigrant" to the United States, and, in fact, made no "application for admission."

As is set forth in Points I and II, supra, there are many factual prerequisites to the status of intending immigrant, the lack of which could have been easily shown upon direct and cross-examination of appellant and several other witnesses. Among those material facts are:

1. That appellant had absolutely no intention of coming to the United States at that time (testimony of appellant and counsel of record, who visited him in Costa Rica and was privy to his intentions during the relevant period).

2. That appellant was forcibly put on Pan Am Flight 542, very much against his will (testimony of appellant and Pan Am agents).

3. That appellant never intended to make, and never in fact did make, an application for admission to the United States (testimony of appellant and officers of the Immigration and Naturalization Service).

4. That appellant had every reason to believe he could not go to, and, if he went, would not be admitted to Greece (testimony of appellant and counsel of record).

5. That appellant's true intention before he went to Costa Rica, while he was in Costa Rica, and at the present time, was and is to go to the Dominican Republic (testimony of appellant, counsel of record and various officials of the government of the Dominican Republic. See footnote, pp. 9-10.)

If appellant can prove, therefore, that he is not an immigrant, or that he made no application for admission to the United States, he proves ipso facto that he is not excludable from the United States. He will then be able to depart in peace, the only remedy that he desires or has ever desired since he was deported from Costa Rica.

As to the power of the District Court to hold such an evidentiary hearing in a habeas corpus proceeding, it is established beyond any doubt whatsoever.

28 U.S.C. 2243 provides:

"Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts."

28 U.S.C. 2246 provides:

"Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits."

28 U.S.C. 2247 provides:

"Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence."

In Walker v. Johnston, 312 U.S. 275 (1941) the Supreme Court noted that the habeas corpus statute commands the taking of testimony when an issue of material fact is tendered by the pleadings. The judicial inquiry into the facts by the court, said Walker v. Johnston, supra at 286:

"involves the reception of testimony as the language of the statute shows."

In Townsend v. Sain, 372 U.S. 293, 311 (1963) the Supreme Court stated:

"The hearing provisions of the 1867 Act remain substantially unchanged in the present codification. 28 U.S.C. 2243. In construing the mandate of Congress, so plainly designed to afford a trial-type proceeding in federal court for state prisoners aggrieved by unconstitutional detentions, this Court has consistently upheld the power of the federal courts on habeas corpus to take evidence relevant to claims of such detention."

Fay v. Noia, 372 U.S. 391, 422 (1963) repeats that:

"the Federal District Court has a broad power on habeas to hold an evidentiary hearing and determine the facts.

The breadth of the federal court's power of independent adjudication on habeas corpus stems from the very nature of the writ, and conforms with the classic English practice."

Harris v. Nelson, 394 U.S. 286, 298-9 (1969) states:

"Petitioners in habeas corpus proceedings, as the Congress and this Court have emphasized, and as we have discussed, supra, at 290-292, 22 L Ed 2d at 285, 286, 287, are entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts. Congress has provided that once a petition for a writ of habeas corpus is filed, unless

[394 US 299]

the court is of the opinion that the petitioner is not entitled to an order to show cause, the writ must be awarded 'forthwith,' or an order to show cause must be issued. 28 USC §2243. Thereafter, if the court concludes that the petitioner is entitled to an evidentiary hearing, cf. Townsend v. Sain, supra; 28 USC § 2254, it shall order one to be held promptly. 28 USC § 2243.

[12, 13] Flexible provision is made for taking evidence by oral testimony, by deposition, or upon affidavit and written interrogatory. 28 USC § 2246. Cf. §§ 2245, 2254 (e). The Court shall 'summarily hear and determine the facts, and dispose of the matter as law and justice require'. 28 USC 2243"

In U.S. ex rel Gaugler v. Brierley, 477 F. 2d 516, 525 (3rd Cir., 1973) the court observed:

"The Supreme Court has squarely ruled that 'the Federal District Court has a broad power on habeas to hold an evidentiary hearing and determine the facts', Fay v. Noia, 372 U.S. 391, 422, 83 S. Ct. 822, 840 (1963)."

See also Clawans v. Rives, 104 F. 2d 240, 245 (D.C. Cir., 1939) where it was said:

"We conclude that the allegations of the petition in the instant case were, if proved, sufficient to entitle the appellant to the relief asked. The court should therefore have heard evidence on the issues raised upon the pleadings."

In Shaughnessy v. U.S. ex rel Accardi, 349 U.S. 280 (1955) involving review of a denial of suspension of deportation, members of the firm of counsel herein were permitted to take deposition testimony of the former Attorney General as well as of the members of the Board of Immigration Appeals.

Petitioner seeks habeas corpus relief (rather than a petition for review in the Court of Appeals), inter alia, because the administrative record fails to show many relevant facts which can be conclusively established by other evidence.

The argument made by respondent in the District Court (at p. 10), that that Court had no power to make independent inquiry into the facts of the case, or try the factual issues de novo, completely ignores the distinction between habeas corpus review and judicial review in the Court of Appeals, where review is so limited by the statute [8 U.S.C. 1105(a)(4)], which provides:

> "(4) except as provided in clause (B) of paragraph (5) of this subsection (citizenship claims), the petition shall be determined solely upon the administrative record upon which the deportation order is based, and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."

Of the cases cited, Soo Yuen v. INS, 456 F. 2d 1107 (9th Cir., 1972); Panagapoulos v. INS, 434 F. 2d 602 (1st Cir., 1970) and Lopez-Blanco v. INS, 302 F. 2d 553 (7th Cir., 1962) were all such petitions for review. Todaro v. Pederson, 205 F. Supp. 612 (N.D. Ohio 1961) appears to have been

a summary judgment action, and Dymytryshyn v. Esperdy, 285 F. Supp. 168 (S. D. N. Y. 1968) was a declaratory judgment action.

As to the cases cited in support of the proposition that the District Court could not try factual issues de novo, Kokkinis v. District Director, 429 F. 2d 938 (2nd Cir., 1970) was a petition for review directly from the Board of Immigration Appeals [whereas the jurisdictional basis for the action is not set forth, it could only have been Section 1105(a)]; Chong Shik Ahn v. District Director, 418 F. 2d 911 (9th Cir., 1969) and Yau v. District Director, 291 F. Supp. 717 (C. D. Calif. 1968) were summary judgment actions.

None of the cited cases were habeas corpus proceedings, which are entitled to the type of review set forth in 28 U. S. C. 2243 et seq. and the case law explicating them, discussed above.

It is worthy of notice that despite the remonstrations of counsel for appellee that the District Court must be bound by the administrative record, appellee nonetheless saw fit to introduce into evidence the file of appellant created before his departure (see affidavit of Elaine C. Buck, filed on October 6, 1970), calling it "the administrative record." In fact, this file was at all relevant times in the office of the Assistant District Director for Detention and Deportation in the Washington, D. C. office of the Immigration and Naturalization Service, and was never before the immigration judge or the Board of Immigration Appeals at any time, and was never considered in their decisions. It is new evidence of the very type that appellee is so adamant in rejecting when it is to be presented by appellant.

Only after a hearing on the merits of the case, including the testimony of appellant and his witnesses, could the District Court possibly have made a determination of the intentions of appellant, which intentions are dispositive of the questions presented in this appeal. This testimony is of immense probative value. See: U.S. ex rel Alexandrovich v. Commissioner, 13 F. 2d 943 (S.D. N.Y. 1925); U.S. ex rel Basile v. Commissioner, 298 Fed. 951 (S.D. N.Y. 1924); U.S. ex rel Rizzo v. Curran, supra.

IV. IT WAS AN ABUSE OF DISCRETION NOT TO RELEASE APPELLANT ON PAROLE. IT WAS ERROR NOT TO RELEASE APPELLANT ON $1,000 BOND.

Section 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. 1182(d)(5) provides for the parole of any alien into the United States for an emergent reason. Such an application was discussed by counsel and appellee early in October, 1974. The conditions of the parole stipulated by the District Director were as follows:

1. The posting of $5,000 security;

2. The waiver of any application which the petitioner might make for adjustment of status to that of a legal permanent resident;

3. Refraining from any employment other than that for which certification has been issued in accordance with Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14).

Appellant finds the condition of employment only at the place for which he possesses a labor certification to be acceptable. As a matter of law, he would be eligible to apply for adjustment of status under section 245

upon his release [see Matter of C-H-, 9 I&N Dec. 265 (1961), wherein a paroled alien under an order of exclusion was held eligible for adjustment, and was granted it], but would, if required, as a condition of his parole, promise to refrain from making such an application.

It is the condition which calls for the posting of a $5,000 bond (with which appellant is unable to comply) which is an indefensible abuse of discretion. In Matter of Patel, Interim Decision No. 2491, decided by the Board of Immigration Appeals on May 7, 1976 (attchd.), it was held that an alien is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, or that he is a poor bail risk.

Appellee has never argued that appellant is a threat to the national security or that he is a poor bail risk, and, in fact, appellant is neither. As in Patel, appellant has never been arrested or convicted of any crime, involved in any subversive or immoral activities, or involved with narcotics. He has worked at the same restaurant for which labor certification has been granted since August, 1973, and has resided in Vienna, Virginia for nearly the same period. He still maintains his apartment in Vienna, and, if he is paroled, can be reached there easily.

The situation of appellant is to be contrasted with those in two cases in which the denial of parole was upheld. In Matter of [illegible]-Y-L-, 9 I&N Dec. 575 (1962) the respondent had no fixed place of abode and indicated that he desired to remain in the United States to work. Appellant herein has a

regular address, a regular job and every intention of leaving the United States voluntarily, quickly and in peace, if only he is permitted to do so.

In Matter of Moise, 12 I&N Dec. 102 (1967), the respondent point-blank refused to leave the United States voluntarily, and there was absolutely no question as to her deportability. Appellant herein, in contrast, has raised serious questions of fact and law pertinent to the question of his excludability (see Points I and II, supra), and, again, will leave the United States voluntarily.

Under these circumstances, there was no reason to require any bond whatsoever. No factual basis for the condition of a $5,000 bond appears in the record, and appellee appears to have totally ignored the teaching of Patel, supra. As was said in U.S. ex rel Parthenides v. Shaughnessy, 146 F. Supp. 772, 775 (S.D. N.Y. 1956):

> "The complete omission of any consideration of these factors, factors which it has considered in other cases, compels the conclusion that its (Immigration and Naturalization Service's) decision was arbitrarily reached."

As the Board of Immigration Appeals has observed in Matter of M, 4 I&N Dec. 626 (1952):

> ". . . when considering discretionary action, it is of the greatest importance in striving for justice and impartiality that all aliens whose cases are substantially similar receive like treatment."

See also, Del Mundo v. Rosenberg, 341 F. Supp. 345 (C.D. Calif., 1972), which requires such equality of treatment.

H. C. & D. Moving and Storage Co. v. U. S., 298 F. Supp. 746, 751 (D. Hawaii 1969), quoting from Mary Carter Paint Co. v. F. T. C., 333 F. 2d 654, 660 (5th Cir., 1964), observes:

> "The law does not permit an agency to grant to one person the right to do that which it denied to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case."

As part of his order to show cause, appellant asked the District Court to release him upon posting of a bond of $1,000, a sum which he could reasonably hope to raise. Without a hearing on the merits (see Point III, supra), and without opinion, the District Court struck this from the order.

Appellant takes this opportunity to note that he is being held in custody, although he has committed no crime. Exclusion and deportation are civil proceedings, as every court which has ever heard a case on the subject has held. Even in a case where an appellant had been convicted of a felony (draft evasion) and indicted for other felonies (arson, destruction of property, assault and battery and conspiracy), Mr. Justice Blackmun noted [Sellers v. U. S., 21 L. Ed. 2d 64; 89 S. Ct. 36 (1968)]:

> "The command of the Eighth Amendment that 'Excessive Bail shall not be required. . . ' at the very least obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons." (Emphasis in original.)

In that case, the Solicitor General opposed bail on the grounds that the District Court, in the exercise of its discretion "reached the conviction that

the petitioner was dangerous, unreliable and contemptuous of the processes of the court." Mr. Justice Blackmun found nothing on the record to support this, and allowed bail. See also, York ex rel Davidescu v. Nicolls, 159 F. 2d 147 (1st Cir., 1947).

In the instant case, there has never been a finding by either the District Director or the District Court that appellant is either a threat to the national security or a poor bail risk, the only two permissable grounds upon which to deny bail to one in appellant's condition. With no such finding, and no evidence whatsoever to support such a finding even if it were made, the denials of parole and bond in this case were plain error.

CONCLUSION

For the reasons set forth above, appellant should be paroled and the judgment below should be reversed and the case remanded to the District Court for purposes of conducting an evidentiary hearing.

Respectfully submitted,

WASSERMAN, ORLOW, GINSBERG & RUBIN

By Jack Wasserman

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Attorneys for Petitioner-Appellant

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A22 126 158 - New York

In the Matter of)

VASSILIOS LOULOS) IN EXCLUSION PROCEEDINGS

-Applicant-)

EXCLUDABLE: I&N Act - Section 212(a)(20) (8 USC 1182(a)(20)) - immigrant - no visa

APPLICATION: Release from custody with opportunity to depart voluntarily

IN BEHALF OF APPLICANT

Wasserman, Orlow, Ginsberg & Rubin, Esqs.
233 Broadway
New York, N.Y. 10007
Robert Frank, Esq., of counsel

IN BEHALF OF SERVICE

John K. Speer, Esq.
Trial Attorney

ORAL DECISION OF IMMIGRATION JUDGE ENTERED ON AUGUST 24, 1976

Applicant last arrived in the United States August 18 or 19, 1976 at the John F. Kennedy Airport, New York, N.Y., a passenger aboard Pan American Flight 542 boarded in Costa Rica. Applicant was not admitted and on August 23, 1976 was referred to an Immigration Judge for determination of admissibility.

Applicant, born April 15, 1952 in Greece, admittedly is an alien, a citizen of that country. He possesses no valid immigration documentation of any kind, neither a visa, passport, travel document nor has he ever been admitted to the United States for permanent residence. Applicant had, however, entered the United States in January 1970 as a crewman and assertedly

remained till May 1976 when he proceeded to Costa Rica having been to receive an immigrant visa from our foreign service officials in that country. After in Costa Rica two and a half months he was deported from that country and is now making his first return to the United States.

Applicant appears prima facie excludable from entry into the United States now as remained by Section 212(a)(20) of the Immigration and Nationality Act.

Applicant has no close family ties in the United States. He neither a visa nor a passport valid for [illegible] Costa Rica and during here against his will he is now at seeking [illegible] entry. He urges, also through counsel, that now [illegible] should be given an opportunity to [illegible] a waiver [illegible] these proceedings, in support of this counsel cites United States ex rel. Iraldi v. Shaughnessy, 183 F.2d 323 (2nd Cir. 1947) [illegible] Gomez Kanar v. Shaughnessy, 178 F.2d 645 (2nd Cir. 1949).

Our inquiry is [illegible]. The cited cases [illegible] not being able to repel respondent's [illegible] feel that the cases referred to by [illegible] applicable. We believe that both refusal to allow [illegible] to enter the United States, who is deemed dangerous to this country, were brought to the United States involuntarily at our request or [illegible] for safekeeping in the latter country here available than at all. The records of now [illegible] feel that the cited cases hold that before such aliens could be deported it [illegible] to afford the respondent an opportunity to have this penalty

voluntarily after their presence of many years subsequent to having been brought here.

As already indicated it is believed the cited cases are not applicable. We are compelled to consider applicant before us, having arrived here not at the request of or for the convenience of the United States government, an applicant for admission to the United States. As such he is excludable under Section 212(a)(20) of the Immigration and Nationality Act.

ORDER: IT IS ORDERED that applicant be excluded and deported from the United States.

Edward P. Grimmel

EDWARD P. GRIMMEL
Immigration Judge

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

SEP 16 1976

File: A22 126 158 - New York

In re: VASSILIOS LOULOS

IN EXCLUSION PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Jack Wasserman, Esq.
1707 "H" Street, N.W.
Washington, D.C. 20006

ON BEHALF OF I&N SERVICE: George Indelicato
Appellate Trial Attorney

ORAL ARGUMENT: September 3, 1976

EXCLUDABLE: Section 212(a)(20), I&N Act (8 U.S.C. 1182 (a)(20)) - Immigrant - not in possession of valid immigrant visa

APPLICATION: Termination of proceedings

The applicant is a 24-year-old alien, a native and citizen of Greece. He last arrived in the United States on August 18 or 19, 1976 at New York City. Inspection was deferred pursuant to section 235(b) of the Immigration and Nationality Act. A notice of hearing (Form I-122) (Ex. 1) was delivered to the applicant by the trial attorney on August 24, 1976. An exclusion hearing was held on August 24, 1976. Subsequent to that hearing, the immigration judge found the applicant excludable under section 212(a)(20) of the Act as an immigrant who was not in possession of a valid immigrant visa. The applicant has appealed from that decision. The appeal will be dismissed.

On August 19, 1976, the applicant made a sworn statement to the Service (Ex. 2). In his affidavit, the applicant stated that he was a native and citizen of Greece who was "not in possession of any visa for the U.S."; that he last entered the United States in January of 1970 as a crewman; that he remained in the United States until May of 1976; and that he then departed for Costa Rica. He indicated that he went to Costa Rica in order to obtain "an immigrant visa from an American consulate abroad"; and that after two and one-half months in Costa Rica, the government of Costa Rica deported him to the United States. The applicant further stated that he arrived in the United States on a Pan American flight without a visa; and that the carrier desired that he proceed from the United States to Greece as an alien in transit without a visa. He indicated that he could not go to Greece because his passport had expired; but that he would have proceeded to Greece if he had a valid travel document.

At the hearing, the trial attorney and the applicant (through counsel) stipulated that the applicant last arrived in the United States at John F. Kennedy Airport located in New York City on August 18 or 19, 1976, as a passenger aboard Pan American Flight 542 after having boarded at San Jose, Costa Rica; and that the applicant was not admitted to the United States. The parties also stipulated that the applicant was born in Greece on April 15, 1952; that he is a citizen of Greece; that neither of his parents was ever citizens of the United States; that the applicant had never been admitted to the United States as a permanent resident alien; and that at the time of his last arrival, the applicant did not present a visa, passport or travel document. Both parties further agreed that the applicant was deported from Costa Rica to the United States; and that the applicant has no close family ties in the United States. The immigration judge noted that, upon arrival in the United States, the applicant indicated that he had a $1,000 bank check made out to his order. Upon the request of the trial attorney and counsel for the applicant, the immigration judge announced that he would not consider the allegation contained in the notice of hearing (Ex. 1) to the effect that the applicant is likely to become a public charge.

Counsel contended at the hearing that the applicant was brought to the United States involuntarily by virtue of his deportation by the government of Costa Rica; and that the applicant is not now applying for admission to the United States. The immigration judge noted that counsel for the applicant specifically declined to apply for a waiver of entry documentation, visa and passport. Counsel further contends that an alien who is involuntarily brought to the United States should be released from custody and be allowed to depart the United States voluntarily. At oral argument, counsel maintained that the applicant did not make an entry into the United States; that the applicant was not applying for admission to the United States; that he was brought to the United States involuntarily; and that an exclusion proceeding is inappropriate. Counsel submits that the applicant must be given the opportunity to depart the United States voluntarily, and if he fails to do so, then it would be appropriate for the government to commence deportation proceedings.

Counsel contends that the applicant did not effect an entry into the United States within the meaning of section 101(a)(13) of the Act. An alien does not effect an entry into the United States unless, while free from actual or constructive restraint, he crosses into the territorial limits of the United States and is inspected and admitted by an immigration officer or actually or intentionally evades inspection at the nearest inspection point. Matter of Pierre et al., Interim Decision 2238 (BIA 1973). In this case, the applicant's entry into the United States (upon his arrival in New York City) was thwarted during an inspection by an immigration officer when the applicant was unable to produce a valid unexpired immigrant visa. We find that the applicant was not admitted, and, therefore, did not effect an "entry" into this country.

In support of his contention that the applicant must be given the opportunity to voluntarily depart from the United States, counsel cites United States ex rel. Bradley v. Watkins, 163 F.2d 328 (2 Cir. 1947); United States ex rel. Paetau v. Watkins, 164 F.2d 457 (2 Cir. 1947); and United States ex rel. Sommerkamp v. Zimmerman, 178 F.2d 645 (3 Cir. 1949). In the Bradley case (a habeas corpus proceeding), the court held that an alien seized by the United States Navy in Greenland, brought to the United States against his will, and interned as an alien enemy for security reasons could not be deported as an "immigrant" — at least, not before

he had been afforded an opportunity to depart voluntarily. The theory of the Bradley decision is that an alien brought here by agents of the United States against his will is not an "immigrant" within the meaning of the immigration laws. In the Sommerkamp case, the facts related to an alien who was seized by the United States Army in Guatemala at the outbreak of World War II, and brought to the United States against his will and interned for security reasons. The alien's internment was subsequently terminated, and he was given the opportunity to depart voluntarily but he did not do so. In a habeas corpus proceeding, the court held that the subsequent presence of the alien in the United States was "voluntary", and therefore he had made an "entry" and was subject to deportation as an immigrant. In the Pastau case (also a habeas corpus proceeding), the facts related to an alien who was deported to Germany by Guatemalan authorities and placed on an airplane bound for the United States. The Guatemalan Government had requested other countries to permit the alien's passage to Germany. The alien, who applied for admission to the United States, was detained and ultimately held in deportation proceedings as an immigrant who had made an illegal entry. The court applied the rationale of the Bradley case, and held that it made no difference whether an alien is forcibly brought into this country directly by the United States authorities or whether such action is accomplished by a foreign government with the consent of the United States. The court was of the opinion that the United States authorities accepted the deportation of the alien from Guatemala, and supported that action when they took steps against the alien for his asserted illegal entry in order to insure his return to Germany. The deportation order was reversed, the writ was sustained, and the alien was released from the custody of the Service.

The rationale that has been consistently expressed by the courts is that an alien who is involuntarily brought to this country by agents of the United States is not considered to be an "immigrant" within the meaning of section 101(a)(15) of the Act. See also United States ex rel. Ludwig v. Watkins, 164 F.2d 456 (2 Cir. 1947). This rationale has been held to be applicable not only to a situation in which agents of the United States directly bring an alien into the United States against his will, but also to a situation in which United States authorities consent to

such an action by a foreign government. See United States ex rel. Paetau v. Watkins, supra. It is apparent that the holdings of these cases are predicated upon the direct participation of United States authorities in effecting the removal of an alien from another country to the United States against his will or upon the consent of United States authorities to such action by the government of a foreign country. We find that the case at hand is factually distinguishable from the above cited cases. The applicant was not brought to this country by agents of the United States against his will. Further, United States authorities did not expressly or impliedly consent to his deportation to the United States by the government of Costa Rica. We therefore conclude that the cases cited by counsel are inapplicable to this case.

Counsel's contention that Vassilios Loulos is not an applicant for admission is without merit. It is clearly implied in the applicant's present and past conduct that he is seeking admission to the United States. We find that the applicant resided in the United States unlawfully for more than six years before he voluntarily departed this country for Costa Rica in a improvident attempt to legalize his status by obtaining an immigrant visa. Further, we find that upon his arrival in the United States following his deportation from Costa Rica, the applicant had the freedom and the financial means to arrange for his transportation to Greece, his native country, but chose not to do so. Instead, he decided to remain in the United States. His statement that he did not go on to Greece because he did not possess an unexpired passport is curious since he also did not have proper documentation to enter the United States.

Section 214(b) of the Act provides that every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the Service, at the time of application for admission, that he is entitled to nonimmigrant status.

At the time of his inspection, the applicant did not present any documentation which would entitle him to enter the United States. We conclude that an exclusion proceeding was the proper forum in this case.

We further conclude that the applicant failed to sustain his burden under section 214(b) of the Act. Therefore, he must be presumed to be an immigrant and is excludable under section 212(a)(20). Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Chairman

CIS:HCB:ec
F. #762337

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

VASSILIOS LULOS,

Petitioner,

- against -

DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK, OR ANY OTHER PERSON HAVING THE SAID PETITIONER IN CUSTODY,

Respondents.

AMENDED ORDER

Civil Action
No. 76 C 1732

- X

An application for a Writ of Habeas Corpus having been made by the petitioner, and the Court having considered the papers submitted by the parties, and all prior proceedings had herein, and the parties having appeared for oral argument on the application on October 8, 1976, it is hereby

ORDERED (1) that the petition for a Writ of Habeas Corpus is denied and the petition dismissed; and it is further

ORDERED (1) that the petition for a Writ of Habeas Corpus is denied and the petition dismissed; and it is further

ORDERED (2) that the stay granted by this Court on September 20, 1976 and thereafter extended until 5:00 p.m., October 8, 1976, enjoining and restraining respondent District Director of the Immigration and Naturalization Service, his agents, servants and employees from deporting petitioner is extended pending the completion by plaintiff of an expedited appeal of the preceding order to the U.S. Court of Appeals for the Second Circuit, provided, however, that such stay is conditioned upon (1) plaintiff filing a notice of appeal herein on or before October 12, 1976 and (2) plaintiff perfecting said appeal in the Second Circuit for an expedited appeal (setting forth a briefing schedule agreeable to both counsel for plaintiff and counsel for respondent) within 10 days thereafter.

Appendix C

MATTER OF PATEL

In Bond Proceedings

A-20284161

Decided by Board May 7, 1976

(1) Generally, an alien is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, or that he is a poor bail risk.

(2) Where it appeared from the record that respondent was living with his wife and United States citizen child, had worked for the same employer for almost two years and had kept the Immigration and Naturalization Service informed of his address changes; and that respondent had never been arrested or convicted of any crime and had never been involved with narcotics or involved in any subversive or immoral activities, there was no reason to justify holding respondent under even a minimal bond, and respondent was ordered released from custody on his own recognizance.

ON BEHALF OF RESPONDENT: Samuel D. Myers, Esquire
Freedman, Freedman & Myers, Ltd.
Suite 2812
230 West Monroe Street
Chicago, Illinois 60606

The respondent appeals from the February 18, 1976 decision of the immigration judge in which he granted a reduction in bond from the $1,000 set by the District Director to $500. The appeal will be sustained.

The statute provides that, pending a determination of deportability, an alien may, upon warrant of the Attorney General, be arrested and taken into custody. Such alien may then, in the discretion of the Attorney General, be continued in custody, released under not less than $500 bond, or released on conditional parole. Section 242(a), Immigration and Nationality Act. The Attorney General's authority in this regard is delegated to certain designated officials by regulation. 8 C.F.R. 242.2(a).

An alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, Carlson v. Landon, 342 U.S. 524 (1952), or that he is a poor bail risk, Matter of Moise, 12 I&N Dec. 102 (BIA 1967); Matter of S-Y-L-, 9 I&N Dec. 575 (BIA 1962).

It is not clear from the record why the respondent was arrested. The factors which the immigration judge considers to be adverse and which in his judgment militate in favor of requiring a bond are that the respondent overstayed his student visa and that the visa petition of which he is the beneficiary was denied because he lacked a labor certification. These factors bear little if any relevance to the issue of whether or not the respondent is likely to appear for his deportation proceeding. Such a broad interpretation of what constitutes an "adverse factor" in this context could result in requiring a bond of almost every alien who is held in deportation proceedings.

In the respondent's favor, it appears from the record that he has never been arrested or convicted of any crime, involved in any subversive or immoral activities, or involved with narcotics. He is living with his wife and United States citizen child, and has been working for the same employer for almost two years; the respondent has kept the Immigration and Naturalization Service informed of his address changes. With regard to the denial of a labor certification, he has filed a suit in federal court.

It appears to us that no reasons have been given to justify holding the respondent under even a minimal bond. Consequently, we shall sustain the appeal and enter the following order.

ORDER: The appeal is sustained, and the respondent shall be released from custody on his own recognizance.

MATTER OF HOSSEINPOUR

In Deportation Proceedings

A-19865881

Decided by Board March 5, 1975

Where a nonimmigrant respondent indicates his desire to remain in this country permanently, by filing for adjustment of status under section 245 of the Immigration and Nationality Act, this action in itself does not constitute a failure to maintain status under section 241(a)(9) of the Act. However, where the respondent [illegible] to show cause why his stay was not terminated after the expiration of his authorized stay he was deportable under section 241(a)(2) of the Act. [Matter of Gallegos, Interim Decision #2177 (BIA 1972) modified.]

CHARGES:

Order: Act of 1952 - Section 241(a)(9) [8 U.S.C. 1251(a)(9)] - Nonimmigrant failed to comply with conditions of nonimmigrant status under which admitted.

Lodged: Act of 1952 - Section 241(a)(2) [8 U.S.C. 1251(a)(2)] - Nonimmigrant remained longer than permitted.

ON BEHALF OF RESPONDENT: Rod L. Poirot, Esquire
701 Elm Street, Suite 500
Dallas, Texas 75202

In a decision dated August 29, 1974, the immigration judge found the respondent deportable on both of the above charges and granted him the privilege of departing voluntarily from the United States within 64 days in lieu of deportation. The respondent has appealed from that decision. The appeal will be dismissed.

The alien respondent is a native and a citizen of Iran who entered the United States in May 1970 as a nonimmigrant student. He obtained authorization to

remain in the United States until May 25, 1973. In February 1973, the respondent filed an application for adjustment of status under section 245 of the Immigration and Nationality Act. On June 21, 1973, the District Director denied that application and informed the respondent that he would be permitted to depart from the United States voluntarily on or before July 21, 1973 without the institution of deportation proceedings. The respondent has not departed.

The immigration judge concluded that the respondent was deportable under section 241(a)(9) of the Act for failure to comply with the conditions of his nonimmigrant status because he submitted an application for adjustment of status. That conclusion was based on language in Matter of Gallares, Interim Decision 2177 (BIA 1972), which indicates that a nonimmigrant who seeks adjustment of status under section 245 of the Act thereby ceases to maintain status as a lawful nonimmigrant. We believe that our language in Gallares concerning the effect of an application for adjustment of status upon the maintenance of valid nonimmigrant status was overly broad.

As originally enacted, section 245(a) of the 1952 Act contained an express provision that: "Any alien who shall file an application for adjustment of his status under this section shall thereby terminate his nonimmigrant status." Act of June 27, 1952, ch. 477, § 245, 66 Stat. 217. The 1958 amendments to section 245 eliminated this provision. Act of August 21, 1958, Pub. L. No. 85-700, § 1, 72 Stat. 699. Since the legislative history of the 1958 amendments indicates that Congress was well aware of the provision automatically terminating nonimmigrant status, we must assume that the deletion of that provision was intentional. S. Rep. No. 2133, 85th Cong., 2d Sess.; 1958 U.S. Code Cong. & Admin. News 3698, 3701. See also 2 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 7.7(b) (1975).

Moreover, courts have held that a desire to remain in this country permanently in accordance with the law, should the opportunity to do so present itself, is not necessarily inconsistent with lawful nonimmigrant status. Brownell v. Carija, 254 F.2d 78, 80 (D.C. Cir. 1957); Bong Youn Choy v. Barber, 279 F.2d 642, 646 (9 Cir. 1960). See also Matter of H-R-, 7 I&N Dec. 651 (R.C. 1958).

To the extent that our language in Matter of Gallares, supra, indicates that an application for adjustment of status automatically terminates lawful nonimmigrant status, that case is modified. We now hold that the filing of an application for adjustment of status is not necessarily inconsistent with the maintenance of lawful nonimmigrant status.

Evidence introduced at the hearing indicates that the respondent has been enrolled in school full time since his arrival in 1970 (Exs. 6a, 6b, 6c, 7). The respondent's testimony indicated that he intended to remain a student even though he had applied for permanent resident status, and that he was willing to return home when his studies were completed if ordered to do so (Tr. pp. 46-7). The respondent also stated that he had not engaged in unauthorized employment, and that he was supporting himself and paying child support with funds from his family (Tr. p. 60). The Service apparently based the out of status charge solely on the fact that the respondent applied for adjustment of status. We conclude that the Service has failed to establish by clear, convincing, and unequivocal evidence that the respondent is deportable under section 241(a)(9) of the Act for failure to comply with the conditions of his nonimmigrant status.

Nevertheless, the record establishes that the respondent's authorized stay in the United States expired on May 25, 1973 (Ex. 3). The respondent received no extension of his authorized stay beyond that date

(Ex. 3; Tr. p. 48). Consequently, the respondent's deportability under section 241(a)(2) of the Act as a nonimmigrant who remained in the United States after the expiration of his authorized stay has been established by clear, convincing, and unequivocal evidence.

Counsel contends that the respondent is not deportable as an overstay because by charging him with being out of status the Service in effect precluded him from obtaining an extension of his stay as a nonimmigrant student. The answer to this contention is threefold: (1) there is no evidence in the record that the respondent ever applied for an extension of his stay as a nonimmigrant student, (2) the Order to Show Cause charging the respondent with being out of status was not issued until after the expiration of the respondent's authorized stay, and (3) the decision whether or not to extend a nonimmigrant's authorized stay is within the sole discretion of the District Director and is not reviewable by the immigration judge or by us. Matter of Halabi, Interim Decision 2322 (BIA 1974).

Finally, counsel contends that the immigration judge should have reinstated the respondent to student status. However, the immigration judge had no jurisdiction to reinstate the respondent's student status. Matter of Gallares, supra; see Matter of Halabi, supra; Matter of Sourbis, 11 I&N Dec. 335 (BIA 1965).

The respondent is deportable as a nonimmigrant who remained beyond the authorized length of his stay. The appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within 64 days from the date of this order or any extension beyond that time as may

be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

VASSILIOS LULOS,

Petitioner-Appellant

v.

DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK, NEW YORK, OR ANY OTHER PERSON HAVING THE SAID PETITIONER-APPELLANT IN CUSTODY

Respondents-Appellees

- X

Civil Action
No. 76-2129

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

MARION R. GINSBERG, being duly sworn, says that she served the attached BRIEF OF PETITIONER-APPELLANT AND APPENDIX upon the United States Attorney, Eastern District of New York, on November 1, 1976, by leaving 1 copies at his office located at 225 Cadman Plaza East, Brooklyn, New York with the person in charge thereof.

Marion R. Ginsberg
MARION R. GINSBERG

Sworn to before me this
1 day of November, 1976.